



IMPORTANT UPDATE

Change to legal privilege exemption

The exemption in the *Freedom of Information Act 1982* (“FOI Act”) for legally privileged documents has from 1 January 2010 been widened to reflect the new legal privilege provisions in the *Evidence Act 2008* (“Evidence Act”).

Under the FOI Act, government agencies may be required to provide access to documents in their possession. However, agencies are not required to provide access to documents subject to “legal professional privilege”. Such documents have always been exempt under s 32 of the FOI Act.

With the introduction of the Evidence Act, s 32 of the FOI Act has been amended to also refer to the Evidence Act concept of “client legal privilege”. Section 32(1) now reads:

A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege [emphasis added].

Division 1 of Part 3.10 of the Evidence Act, entitled “client legal privilege”, sets out when evidence that relates to the provision of legal advice, or litigation, is not to be adduced.

The change to s 32 means that in determining whether privilege applies to a document under the FOI Act, we must now have regard to both the common law concept of “legal professional privilege” and the Evidence Act concept of “client legal privilege”.

The two concepts of privilege are similar. However, the courts have insisted that they are distinct, and it is possible that a document may be subject to privilege under one concept but not the other. A document is exempt under s 32 if *either* one of the common law *or* the Evidence Act tests for privilege is satisfied.

If you require any further information or assistance about how this change affects your agency, please do not hesitate to contact us.

Dated: 23 February 2010

A handwritten signature in black ink that reads 'Mick Batskos'.

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